IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 13, 2008 Session

LORI SCHMANK v. SONIC AUTOMOTIVE, INC., ET AL.

Appeal from the Circuit Court for Bradley County
No. V-04-369 John B. Hagler, Jr., Judge

No. E2007-01857-COA-R3-CV - FILED MAY 16, 2008

The plaintiff brought this claim under the Tennessee Consumer Protection Act ("TCPA") against an automobile dealer, its owner, and Automobile Protection Corporation ("APCO"), alleging that the sale of an anti-theft product called "Easy Care ETCH," which she purchased with vehicles from the dealer, violated the TCPA. We affirm the trial court's ruling that this action, filed over four years after the plaintiff's first purchase and nearly three years after her second purchase, was not timely brought under the applicable one-year statute of limitations. Accepting the plaintiff's allegations in her complaint as true, we do not agree with her argument that the application of the discovery rule operates to toll the limitations period under the facts presented, and therefore, we affirm the trial court's dismissal of the complaint on the pleadings pursuant to Tenn. R. Civ. P. 12.02(6) and 12.03.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Michael A. Anderson, Chattanooga, Tennessee, for the Appellant, Lori Schmank.

Robert L. Lockaby, Jr., Chattanooga, Tennessee, and J. Andrew Keyes, Washington, D.C., for the Appellees, Town & Country Ford of Cleveland, LLC, and Sonic Automotive, Inc.

Steven D. Lipsey, Knoxville, Tennessee, Brian C. Anderson and Andrew J. Trask, Washington, D.C., for the Appellee, Automobile Protection Corporation.

OPINION

I. Background

Lori Schmank bought a new Ford F-250 pickup truck from Defendant Town & Country Ford of Cleveland, Tennessee on March 28, 2000. Included in the sale of the truck was an anti-theft product called Easy Care ETCH that was provided by Defendant APCO. The Easy Care ETCH product consisted of an acid-etched number stenciled on the windows of the truck, and a warranty that if the vehicle was stolen and declared a total loss by the buyer's primary auto insurance company, APCO would pay the buyer $2,500. Alternatively, APCO warranted that it would pay the deductible of the owner's primary auto insurance up to $1,000 if the vehicle was stolen, but not declared a total loss. Ms. Schmank paid $299 for the Easy Care ETCH product.

Fifteen months later on June 28, 2001, Ms. Schmank bought a new Ford F-350 pickup truck from Town & Country Ford. Her purchase again included the Easy Care ETCH product, and this time she paid $199 for the product. At the time of each sale, Town & Country provided Ms. Schmank with an itemized bill of sale that included a typewritten item called "THEFTGUARD" and the price of the anti-theft product. Ms. Schmank signed each bill of sale and was provided a copy. Ms. Schmank also signed an Easy Care ETCH warranty registration form at the time of each sale that provided the price and a full description of the warranty benefit, in addition to the following statement directly above the signature line: "I have read this Warranty in its entirety and I understand and agree to all the provisions herein." The warranty registration form contained a "declination of warranty registration" section providing the buyer an option to decline the Easy Care ETCH warranty. Although she does not deny signing the registration form, Ms. Schmank alleges that she did not receive a copy of the form at either the 2000 or 2001 sale.

On April 21, 2004, Ms. Schmank filed this action alleging that the Defendants violated the TCPA by "stuffing" a worthless product, the Easy Care ETCH system and attendant warranty, into the vehicle sales agreements. The complaint alleged that Town & Country Ford "engaged in a pattern of unfair and deceptive acts" and sought certification as a class action.[1] Defendants Town & Country Ford and Sonic Automotive, Inc. (Town & Country's owner) responded by answer and motion to dismiss the complaint under Tenn. R. Civ. P. 12.02(6). After the second amended complaint added Defendant APCO, the provider of the Easy Care ETCH product, APCO filed a motion to dismiss on the pleadings under Tenn. R. Civ. P. 12.03. The Defendants alleged, among other things, that the action was not timely brought under the applicable one-year statute of limitations of the TCPA, Tenn. Code. Ann. § 47-18-110.

The trial court granted the Defendants' motions "primarily, on the statute of limitations issue as to each purchase and, secondarily, on the issue of failure to state a claim under the Tennessee Consumer Protection Act."

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[1]The request for class action certification became moot when the trial court dismissed the action on the pleadings. In any event, the Tennessee Supreme Court has recently ruled that class actions are not authorized by and cannot be maintained under the TCPA. ***Walker v. Sunrise Pontiac-GMC Truck, Inc.,*** — S.W.3d —, No. W2006-01162-SC-S09-CV, 2008 WL 375257, at *7-8 (Tenn. Feb. 13, 2008).

II. Issue Presented

Ms. Schmank appeals, raising several issues, one of which is dispositive of the case and renders the other issues moot. It is stated in her brief as follows:

Whether the trial court erred in granting the Defendants' motion to dismiss on the grounds that Plaintiff's claims were barred by the statute of limitations when the complaint was filed within a year of the time that Plaintiff asserted that she discovered her injury.

III. Analysis

A. Standard of Review

In reviewing a trial court's ruling on a motion for judgment on the pleadings, we must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion, in this case Ms. Schmank. ***Cherokee Country Club, Inc. v. City of Knoxville,*** 152 S.W.3d 466, 470 (Tenn. 2004); ***McClenahan v. Cooley,*** 806 S.W.2d 767, 769 (Tenn. 1991). Additionally, "[c]onclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *Id.*

B. Application of the Discovery Rule

The Tennessee Consumer Protection Act provides that an individual or private action commenced for injury resulting from an unfair or deceptive act or practice "shall be brought within one (1) year from a person's discovery of the unlawful act or practice . . . ." Tenn. Code Ann. § 47-18-110.[2] Thus, the Tennessee legislature has determined that a plaintiff's TCPA claim accrues at time of the "discovery of the unlawful act or practice," thereby making applicable the "discovery rule" first applied over thirty years ago in ***Teeters v. Currey***, 518 S.W.2d 512 (Tenn. 1974). *Id.;* ***Heatherly v. Merrimack Mut. Fire Ins. Co.***, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000). The Supreme Court recently restated the discovery rule as follows:

> It is now well-established that, where applicable, the discovery rule is an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, *or in the exercise of reasonable care and diligence, should know that an injury has been sustained*. ***Quality Auto Parts Co. Inc.,*** 876 S.W.2d [818,] at 820 [Tenn. 1994].

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[2] Ms. Schmank has attempted to avoid the operation of the one-year statute of limitations by alleging that the Defendants engaged in a civil conspiracy to violate the TCPA, a claim that she argues is subject to a three-year limitations period. The trial court correctly rejected this argument because "the procedural law applicable to the gravamen of the complaint applies to [a] civil conspiracy claim." ***Swafford v. Memphis Indiv. Practice Ass'n,*** No. 02A01-9612-CV-00311, 1998 WL 281935, at *11 (Tenn. Ct. App. W.S., filed June 2, 1998). Because "[t]he applicable statute of limitations in a particular cause will be determined according to the gravamen of the complaint," ***Vance v. Schulder***, 547 S.W.2d 927, 931 (Tenn. 1977), which in this case is alleged violation of the TCPA, the applicable statute of limitations is the one-year period prescribed by Tenn. Code Ann. § 47-18-110.

> The discovery rule does not, however, toll the statute of limitations until the plaintiff *actually* knows that he or she has a cause of action. *The plaintiff is deemed to have discovered the right of action when the plaintiff becomes aware of facts sufficient to put a reasonable person on notice that he or she has suffered an injury as a result of the defendant's wrongful conduct*. ***Shadrick v. Coker****,* 963 S.W.2d 726, 733 (Tenn. 1998); ***Roe v. Jefferson****,* 875 S.W.2d 653, 657 (Tenn. 1994). Were statutes of limitations strictly applied, plaintiffs would be required to sue "to vindicate a non-existent wrong, at a time when the injury is unknown and unknowable." ***Teeters****,* 518 S.W.2d at 515. The discovery rule is intended to prevent the inequity such a strict application of the rule would produce. ***Quality Auto Parts Co. Inc****.,* 876 S.W.2d at 820.

Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 621 (Tenn. 2002) (emphasis added).

Ms. Schmank argues that the trial court erred in ruling that the discovery rule did not toll the statute of limitations under the facts as pleaded and the reasonable inferences drawn therefrom in her favor. We disagree. Assuming (without deciding) that the allegations in her complaint state a cause of action under the TCPA, all of the facts sufficient to put a reasonable person on notice that she had suffered injury resulting from the Defendants' allegedly wrongful conduct were known or readily available to Ms. Schmank at the time she entered into the agreement to purchase her vehicles.

Generally speaking, in applying the discovery rule, the issue of "[w]hether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine." ***Wyatt v. A-Best Co.,*** 910 S.W.2d 851, 854 (Tenn. 1995); ***McIntosh v. Blanton***, 164 S.W.3d 584, 586 (Tenn. Ct. App. 2004). However, where the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff did not know, or in the exercise of reasonable care and diligence should not have known, that he or she was injured as a result of the defendant's wrongful conduct, Tennessee case law has established that judgment on the pleadings or dismissal of the complaint is appropriate. *Cf.* ***Roe v. Jefferson***, 875 S.W.2d 653, 658 (Tenn. 1994) (affirming summary judgment where "no reasonable trier of fact could find that [plaintiff] Roe was unaware that she had suffered an injury for purposes of the discovery rule"); ***Stanbury v. Bacardi***, 953 S.W.2d 671, 677-78 (Tenn. 1997) (affirming dismissal of complaint where plaintiff held to have been "aware of facts sufficient to put a reasonable person on notice that she had suffered an injury" despite plaintiff's assertion that she did not discover her claim until later); ***Brandt v. McCord***, No. M2007-00312-COA-R3-CV, 2008 WL 820533, at *4 (Tenn. Ct. App. M.S., filed Mar. 26, 2008) (affirming dismissal of complaint where facts established "as a matter of law" that plaintiffs had enough knowledge to put a reasonable person on notice, despite plaintiffs' invocation of discovery rule).

Ms. Schmank's complaint does not allege that she was unaware that she was purchasing Easy Care ETCH with her vehicles, nor that she was unaware of the price she was paying for Easy Care

ETCH, nor that she did not read, understand, and sign the Easy Care ETCH warranty registration document fully describing the product and its warranty benefits. Her complaint alleges unfair and deceptive trade practices by the Defendants in the following particulars:

> a. The product has no value in deterring theft because the product does not disable the vehicle, does not set off an alarm, does not alert police and does not prevent entry into the vehicle;
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> b. The product does not provide the customer with a means of tracing the car once stolen because the ETCH markings are not peculiar to the customer's car and do not aid police in locating the stolen vehicle's owner;
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> c. The product's etching includes an "800" number for the owner to call to report the theft to APCO but, unfortunately, the "800" number etching is stolen with the car and, unless the owner had the prescience to record the number before theft, he or she is effectively prevented from making a claim;
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> d. Easy Care ETCH is not a deterrent because the etch markings are acid etched, wear over time and are so subtle that they are nearly impossible to detect, let alone read, at dusk or dark;
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> e. Easy Care ETCH is not a deterrent to joyriding car thieves, to thieves who move cars out of the country or to thieves operating chop shops – the major reasons for car thefts;
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> f. The Easy Care ETCH "warranty" is actually an insurance policy issued by APCO through its Sonic agent, whereby the customer pays inexplicably wavering premiums from $199.00 to $399.00 or more (depending on how much "leg" is available for financing to keep the monthly payment within the customer's budget) to cover a risk limited to $1,000. Payments are made only when the following specific conditions are met: the car is stolen, the insured receives a check from his primary insurer, the claim is made in 90 days, a police report is attached and the customer has a copy of his Easy Care ETCH warranty (regardless that APCO has a complete registry of policyholders), and
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> g. APCO's Easy Care ETCH product provides an insurance benefit of $2,500 where the car is stolen and the customer's primary insurer considers the car a total loss; however, primary insurers will refuse to pay claims where the customer reports a duplicative insurance policy. The purported "warranty benefit" to the consumer is illusory because he cannot recover twice for the same loss. Because the so-called

> warranty is illusory, but costs the consumer hundreds of dollars, defendants have engaged in an unfair and deceptive practice in violation of Tennessee's Consumer Protection Act.

We agree with the trial court's ruling and rationale regarding these seven allegations, as stated by the trial court as follows:

> [T]he statute was not tolled, as a matter of law, by any fact or circumstance that an ordinary consumer exercising ordinary care could not have discovered on either the dates of purchase or within one year thereafter. The seven matters which plaintiff alleges she discovered in 2004 are legal conclusions or irrelevant to the cause of action. The first six were easily discoverable, and the seventh is irrelevant.

Ms. Schmank's second amended complaint further alleges the following regarding her later "discoveries" of certain alleged facts:

> At the time of her purchases, Schmank was not aware that the ETCH product was an insurance product; she was not aware that defendants did not hold a license to sell insurance in Tennessee; she was not aware that defendants did not file a rate schedule with the Tennessee Insurance Commissioner for the ETCH product; she was not aware that the ETCH "warranty benefit" was illusory because she could not collect on duplicative insurance policies; she was not aware that the obscured "THEFTGUARD" notation on her purchase order was actually Easy Care ETCH; she was not aware that Easy Care ETCH is not an "Auto Security System" as stated on the "Warranty Registration" because the product does not secure the vehicle; and, she was not aware that money she was paying for this product was split between the defendants. She only became aware of these matters in March 2004.

We are of the opinion that these allegations also pertain to facts that are either irrelevant to the cause of action or readily discoverable at the time of purchase. We do not agree with Ms. Schmank's legal argument that the Easy Care ETCH product is an insurance product.[3]

[3] Although Ms. Schmank repeats her assertion that the Easy Care ETCH product is an insurance product in her appellate brief, she cites no legal authority supporting that conclusion. Several courts from other jurisdictions presented with the same argument have concluded that the product is not an insurance product. ***Moroz v. Alexico Corp.,*** 2008 WL 109090, at *4 (E.D.Pa. 2008); ***Pope v. TT of Lake Norman, LLC***, 505 F. Supp. 2d 309, 312 (W.D.N.C. 2007); *see also* Tenn. Code Ann. § 56-55-103(b) (2005) (Tennessee Vehicle Protection Product Act, passed subsequently to this action, providing that "[a] vehicle protection product warranty provided or sold in compliance with this chapter is not a contract of insurance").

Simply stated, Ms. Schmank has alleged no new "discovery" of additional relevant facts suggesting injury resulting from the Defendants' wrongful conduct that were not already readily available to her at the time of purchase. Although Ms. Schmank further argues that the statute of limitations should be tolled because of the Defendants' fraudulent concealment, the Supreme Court has explained the requirements for that doctrine as follows:

> In ***Shadrick v. Coker***, 963 S.W.2d 726 (Tenn. 1998), this Court explained that to establish fraudulent concealment, a plaintiff must prove the following: (1) that the defendant took affirmative action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so; (2) that the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence; (3) that the defendant had knowledge of the facts giving rise to the cause of action; and (4) that the defendant concealed material facts from the plaintiff by withholding information or making use of some device to mislead the plaintiff, or by failing to disclose information when he or she had a duty to do so.

Pero's Steak and Spaghetti House, 90 S.W.3d at 625; *see also* ***Fahrner v. SW Manufacturing, Inc,*** 48 S.W.3d 141 (Tenn. 2001). Ms. Schmank's complaint does not allege any false or misleading statement or assertion by any Defendant regarding the sale of the Easy Care ETCH product, nor any concealment of material facts surrounding the sale. Ms. Schmank was aware of the price of the product she was buying and was provided a full description of its terms and warranties at the time of sale. Her claim that she later discovered that the product was "worthless" is not sufficient to toll the statute of limitations contained in the TCPA, either by operation of the discovery rule or the fraudulent concealment doctrine.

IV. Conclusion

For the aforementioned reasons, the judgment of the trial court dismissing Ms. Schmank's claim because it was untimely filed pursuant to Tenn. Code Ann. § 47-18-110 is affirmed. Costs on appeal are assessed to the Appellant, Lori Schmank.

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SHARON G. LEE, JUDGE